

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE H. WALKER, JR. and DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

*Docket No. 98-1760; Submitted on the Record;
Issued June 16, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's November 28, 1997 request for reconsideration.

On the prior appeal of this case,¹ the Board noted that the Office's March 1, 1994 merit decision denying appellant's asthma claim did not consider additional evidence received on March 1, 1994. The Board set aside the Office's March 1, 1994 decision and remanded the case for a review of all the relevant evidence and an appropriate final decision on appellant's asthma claim. The facts of this case are set forth in the Board's prior decision and are hereby incorporated by reference.

In a decision dated September 9, 1997, the Office denied appellant's asthma claim on the general grounds that the medical evidence was insufficient to establish that his federal employment caused or contributed to this condition.

On October 8, 1997 appellant requested reconsideration. He argued that two reports supported his claim of an employment-related asthma condition: the December 28, 1989 report of Dr. Erik R. Swenson and the January 30, 1997 report of Dr. Edwyn L. Boyd, who reported that the records appellant presented "did clearly seem to indicate that he was placed in a work environment that aggravated his condition and he was removed from that environment and improved." He stated that he agreed with Dr. Swenson that appellant's history and documentation all supported the diagnosis of an occupationally acquired asthma or reactive airway disease syndrome, which might be lifelong despite the cessation of exposure to the initial inciting agents.

In a decision dated October 31, 1997, the Office noted that the medical evidence previously submitted to support appellant's asthma claim failed to take into account that

¹ Docket No. 94-1743 (issued February 7, 1996).

appellant had a history of smoking, that he had preexisting rhinitis and sinusitis, or that he wore an air-fed mask and safety clothing when sandblasting. The Office found that Dr. Boyd's January 30, 1997 report failed to correct these deficiencies, that it was similar to the previously considered December 28, 1989 report of Dr. Swenson and that it was therefore cumulative and insufficient to warrant a review of its prior decision.

On November 28, 1997 appellant again requested reconsideration. He stated that he was submitting new and material evidence to prove that he did not have rhinitis or sinusitis while serving in the United States Navy from October 1972 through 1978. Appellant submitted a decision from the Department of Health and Human Services, Social Security Administration, Office of Hearings and Appeals, in the matter of his claim for disability insurance benefits.² He also submitted a July 13, 1996 rating decision by the Department of Veterans Affairs finding that his claim for "service connection of sinusitis/rhinitis is not well grounded." This decision noted that there was no record of treatment in service for sinusitis or rhinitis.

In a decision dated March 6, 1998, the Office denied appellant's November 28, 1997 request for reconsideration. The Office noted that the reports of both Drs. Swenson and Boyd were previously considered and found to be insufficient to establish a causal relationship to employment: "Neither was based on a complete and accurate factual history, including the claimant's smoking history and his use of an air-fed mask and safety clothing while sandblasting." The Office found that the decisions of the Social Security Administration and the Department of Veterans Affairs were of no evidentiary value in establishing that appellant's asthma condition was work related. The Office concluded as follows: "Since no new medical evidence was submitted in support of the reconsideration request, the information received is inconsequential in regard to the issue of causal relationship. Therefore, the employee's contentions and new evidence are found to be immaterial to the issue of causal relationship and are not sufficient to warrant a merit review of the September 9, 1997 decision."

The Board finds that the Office abused its discretion in denying a merit review of appellant's asthma claim.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.³

Appellant is entitled to a review of the merits of his asthma claim under the third criterion above. The Office conducted a merit review of appellant's claim on September 9, 1997 and found that the medical evidence was insufficient to establish the element of causal relationship.

² At page 2, this decision notes that appellant "has a long history of allergic asthma...." At page 3, the decision notes that appellant "has a history of a respiratory impairment" and would have to avoid exposure to environmental irritants such as dust and fumes. The decision's date is not clear but follows a hearing held on December 17, 1992, the transcript of which appellant also submitted.

³ 20 C.F.R. § 10.138(b)(1).

Appellant responded by submitting the January 30, 1997 report of Dr. Edwyn L. Boyd, who supported causal relationship. The Office found this opinion to be cumulative, however, because it was similar to previous medical evidence and failed to correct certain deficiencies. Specifically, the Office found that Dr. Boyd's opinion failed to take into account that appellant had a history of smoking, that he had preexisting rhinitis and sinusitis or that he wore an air-fed mask and safety clothing when sandblasting. In his November 28, 1997 request for reconsideration, appellant argued that the Office's decision was in error, that in fact he had no preexisting rhinitis or sinusitis while serving in the United States Navy from October 1972 through 1978. To support this contention, he submitted a July 13, 1996 rating decision by the Department of Veterans Affairs finding that his claim for "service connection of sinusitis/rhinitis is not well grounded" and noting that there was no record of treatment in service for sinusitis or rhinitis.

This evidence, not previously considered by the Office, is relevant and pertinent to the grounds upon which the Office denied appellant's claim. This evidence bears directly on the probative value of Dr. Boyd's January 30, 1997 opinion. The requirement for reopening a claim for merit review does not include the requirement that a claimant submit all evidence necessary to discharge his burden of proof. The requirement pertaining to the submission of evidence specifies only that the evidence be relevant and pertinent and not previously considered by the Office.⁴ A claimant has a right to secure a review of the merits of his case when he presents new evidence relevant to his contention that the decision of the Office is erroneous. The presentation of such new and relevant evidence creates a necessity for review of the full case record, that is, of all of the evidence, in order to properly determine whether the newly supplied evidence, considered with that previously in the record, shifts the weight of the evidence in such a manner as to require modification of the earlier decision. If the Office determines that the new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on its merits.⁵

Accordingly, the Board will set aside the Office's March 6, 1998 decision denying appellant's November 28, 1997 request for reconsideration. The Board will remand the case to the Office for a *de novo* review of appellant's claim that he sustained an employment-related asthma condition. Following such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's asthma claim.

⁴ *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

⁵ *Joseph R. Alsing*, 39 ECAB 1012 (1988).

The March 6, 1998 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, D.C.
June 16, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member